TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 397

CHARTER SHIPPING COMPANY, LTD.,
PETITIONER,

vs.

BOWRING, JONES & TIDY, LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,528)

(34,528)

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[fols. a-1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

BOWRING, JONES & TIDY, LTD., Libellant,

vs.

CHARTER SHIPPING COMPANY, Respondent

STATEMENT

1928.

July 16. Filed libel and stipulation for costs, issued monition returnable July 31st, 1928.

July 18. Filed stipulation for value, appearance, and stipulation for costs.

July 19. Filed monition, vessel attached and released, 17th inst.

Sept. 25. Filed exceptions to libel and exceptive allegations.

Dec. 3. Filed Notice of Motion to dismiss exceptive allegations and exceptions to libel and to direct Respondent to file its answer within 15 days. Exceptions to the libel sustained. See memo. Endorsed.

Dec. 3. Filed affidavit opposing motion.

Dec. 7. Filed Bill of Costs—$98.82.

[fol. 2]

Dec. 8. Filed order sustaining exceptions to libel and dismissing the libel with costs—$98.82, Thacher, J.

Dec. 20. Filed Order and Notice of Appeal—Coleman, J.

Dec. 20. Filed Assignment of Errors.

Dec. 20. Filed stipulation waiving bond for costs on appeal.

IN UNITED STATES DISTRICT COURT

LIBEL

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libel and complaint of Bowring, Jones & Tidy, Ltd., Libellant, against Charter Shipping Company, Ltd., Re-

spondent, in a cause of contract civil and maritime, alleges and respectfully shows to this Honorable Court, upon information and belief, as follows:

First. That at all the times hereinafter mentioned your libellant was and now is a foreign corporation organized and existing under the Laws of the Kingdom of Great Britain.

Second. That the respondent Charter Shipping Company, Ltd., at all the times hereinafter mentioned was and now is a foreign corporation duly created and existing under and [fol. 3] by virtue of the Laws of the Kingdom of Great Britain, and having within this jurisdiction or which will during the pendency of this action have within this jurisdiction, certain goods, chattels, credits or vessels, namely the Steamship "Charterhulme" subject to the jurisdiction of this Court by writ of foreign attachment.

Third. That at all the times hereinafter mentioned the respondent was a common carrier of goods for hire and owned and operated in its said business the Steamship "Charterhague" among others, between various ports, including the ports of Savannah and Brunswick, Georgia, Jacksonville, Florida and London, England.

Fourth. That in the month of September, 1926, at the ports of Savannah and Brunswick, Georgia, and Jacksonville, Florida, the Naval Stores Export Corporation, an American Corporation, delivered to the respondent and shipped on board respondent's vessel, the Steamship "Charterhague,"

4050 barrels of American Turpentine,
300 barrels of American Rosin, and
200 barrels of American Rosin,

for transportation to the port of London, consigned to the order of shippers.

Fifth. That thereupon the agents for the respondent in said ports of Savannah and Brunswick, Georgia, and Jacksonville, Florida, issued and delivered to the said Naval [fol. 4] Stores Export Corporation at said ports of Savannah and Brunswick, Georgia, and Jacksonville, Florida, bills of lading whereby respondent by its said agents ac-

knowledged receipt from the said Naval Stores Export Corporation of said 4050 barrels of American Turpentine, 300 barrels of American rosin and 200 barrels of American rosin to be transported on the Steamship "Charterhague" to the port of London and there to be delivered unto the order of shippers.

Sixth. That thereafter said bills of lading were endorsed and delivered to libellant.

Seventh. That the said Steamship "Charterhague" proceeded on her voyage from the said ports of Savannah and Brunswick, Georgia, and Jacksonville, Florida, with said cargo aboard.

Eighth. That before the said Steamship "Charterhague" arrived at the port of London and before libellant learned the facts of unseaworthiness and improper equipped, manning and supplying hereinafter alleged, respondents' representative advised libellant that though the Steamship "Charterhague" was still at sea, respondent had been advised that libellant's cargo would be liable on account of general average and/or salvage and/or charges and that deposits of £1,252.4.2. with respect to the 4050 barrels of American Turpentine, £49.4.7. with respect to the 300 barrels of American Rosin and £32.14.0 with respect to the 200 barrels of American Rosin or the sum of £1,334.2.9 in all, [fol. 5] would be required in order to release libellant's cargo from an alleged lien of the respondent upon said cargo on account of general average and/or salvage and/or charges.

Ninth. That thereupon libellant made said deposits to Messrs. Francis & Arnold, acting for the respondent, and libellant received three general average receipts acknowledging receipt of said sums as deposits on account of general average and/or salvage and/or charges, being three percent. of the arrived value of said merchandise, which said receipts are in libellant's possession and which libellant will produce on the trial of this action.

Tenth. That subsequently libellant was informed and believes that the SS. "Charterhague" was unseaworthy and not properly equipped, supplied and manned and that

due diligence had not been used to render her seaworthy, properly equipped, supplied and manned at the beginning of her said voyage from Savannah and Brunswick, Georgia, and Jacksonville, Florida, and that therefore libellant alleges that there is no liability on the part of libellant on account of general average and/or salvage and/or charges and that the amounts of the aforesaid deposits are due and returnable to libellant.

Eleventh. That libellant has duly demanded the return of said deposits amounting in all to the sum of £1334.2.9, but the return of the same has been refused except the sum [fol. 6] of £163.18.1 which has been received by libellant under an agreement with respondent that the receipt of said sum of £163.18.1 was without prejudice to libellant's rights, if any, to recover the balance of said deposit of £1334.2.9.

Twelfth. That there is still due and owing to libellant the sum of about £1170.4.8 (approximately Five thousand seven hundred fifty Dollars ($5750.), no part of which has been paid although the same has been duly demanded.

Thirteenth. That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libellant prays that citation in due form of law according to the rules and practice of this Honorable Court in causes of Admiralty and Maritime Jurisdiction may issue against the respondent Charter Shipping Company, Ltd., citing it to appear and answer all and singular the matters aforesaid, and that if the said respondent cannot be found within this District all its goods, chattels, credits or vessels within this District, and particularly the Steamship "Charterhulme" may be attached by process of foreign attachment to the sum of Five thousand seven hundred fifty Dollars, the sum sued for in this libel, with interest and costs, and that a decree may be entered herein in favor of the libellant against said respondent for the amount of libellant's damages, as set forth, together with [fols. 7 & 8] with interest thereon and libellant's costs and disbursements; that the said Steamship "Charterhulme," her engines, boilers, etc., may be condemned and sold to

pay the same, and that the Court will grant to the libellant such other and further relief as may be just.

Theodore L. Bailey, Proctor for Libellant. Office and Post Office address: No. 15 William Street, Borough of Manhattan, New York City.

Duly sworn to by Theodore L. Bailey. Jurat omitted in printing.

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEARANCE

SIR: Please take notice that the respondent, Charter Shipping Company, Ltd., hereby appears in the above entitled action and that we are retained as proctors for it herein.

Dated New York, July 17, 1928.

Yours, etc., Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Respondent, 27 William Street, Borough of Manhattan, New York City.

To Theodore L. Bailey, Esq., Proctor for Libellant, 15 William Street, New York City; Alex. Gilchrist, Jr., Esq., Clerk.

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTIONS TO LIBEL

Respondent, Charter Shipping Company, Ltd., excepts to the libel herein on the following grounds:

First. It appears from the libel and the exceptive allegations hereunto attached that both libellant and respondent are British corporations having their principal places of business in England; and that the general average adjustment has been made up by British average adjusters in England, namely, Messrs. Francis & Arnold, by reason

of which, on the facts stated in the libel, this court should not assume jurisdiction of this action.

Second. The facts stated in the libel do not constitute an admiralty and maritime cause of action within the jurisdiction of this court.

Dated New York, September 24, 1928.

Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Respondent. Office and P. O. address: 27 William Street, Borough of Manhattan, City of New York.

[fol. 11] In United States District Court

[Title omitted]

Exceptive Allegations to Libel

Respondent, Charter Shipping Company, Ltd., for its exceptive allegations to the libel herein, alleges, upon information and belief, as follows:

First. Both libellant and the respondent are British corporations having their original places of business in England.

Second. The general average statement covering the voyage referred to in the libel has been made up by average adjusters in England, namely, Messrs. Francis & Arnold.

Third. By reason of the matters herein set forth, this court does not have jurisdiction of the subject matter of this action, nor should it assume jurisdiction of the parties on the matters set forth in the libel.

Dated New York, September 24, 1928.

Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Respondent. Office and P. O. address: 27 William Street, Borough of Manhattan, City of New York.

[fol. 12] *Duly sworn to by Cletus Keating. Jurat omitted in printing.*

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO DISMISS EXCEPTIONS, ETC.

SIRS: Please take notice that upon the libel herein filed in the office of the Clerk of this Court July 16, 1928, upon the Notice of Appearance of the respondent, the Monition issued to the Marshal and the Marshal's return showing that he had arrested the Steamship "Charterhulme" on July 17, 1928, and upon the release and bond of the National Surety Company in the sum of Five thousand seven hundred fifty Dollars ($5,750.) showing the release of said Steamship "Charterhulme" from the arrest by filing of said bond, and upon the Exceptions to the Libel and the Exceptive Allegations of the Respondent, and upon the annexed affidavit of Theodore L. Bailey, proctor for libellant, and all proceedings herein, the undersigned will move this Court at a Stated Term for the hearing of motions, to be held in the Court Rooms in the United States Court [fol. 14] in the Woolworth Building, 233 Broadway, in the Borough of Manhattan, City of New York, on the 16th day of November, 1928, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing said Exceptive Allegations and dismissing said Exceptions to the Libel and directing that the Respondent file and serve its Answer to the Libel herein within fifteen days thereafter and in default thereof that decree be entered by libellant against the respondent pro confesso.

Dated New York, September 26, 1928.

Yours, etc., Theodore L. Bailey, Proctor for Libellant. Office and Post Office address: No. 15 William Street, Borough of Manhattan, New York City.

To Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Respondent, No. 27 William Street, New York City.

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF THEODORE L. BAILEY

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Theodore L. Bailey, being duly sworn, deposes and says: I am the proctor for the Libellant herein.

That this action was begun by the filing of libel on July 16, 1928, in personam, with prayer for writ of foreign attachment. That on July 17, 1928, monition was issued to the marshal for this District who under the writ of foreign attachment arrested the S. S. "Charterhulme" a vessel then lying in the harbor of New York owned by the respondent. That thereupon the respondent did serve and file his general (not special) appearance appearing by Messrs. Kirlin, Woolsey, Campbell, Hickox & Keating as proctors, and did also file a bond of the National Surety [fol. 16] Company in the sum of Five thousand seven hundred fifty Dollars to release the said Steamship "Charterhulme" from such attachment, whereupon the said Steam- "Charterhulme" was so released by the marshal.

That a few weeks subsequent to the foregoing proceedings deponent is informed and believes that a suit was commenced by the respondent against the libellant in England alleging that a dispute had arisen between the parties, Bowring, Jones & Tidy, Ltd., claiming to be entitled to the relief prayed for in the libel herein, and asking that the Court award the Charter Shipping Company, Ltd., a declaratory judgment against Bowring, Jones & Tidy, Ltd.

That deponent verily believes that this English suit was commenced despite the fact that the present suit was already pending in the American Court and that said suit was commenced in the English Court in order to have the matters in dispute adjudicated in England so that the American Law, and especially the Harter Act, would not be applied.

This litigation grew out of shipments of American rosin by an American shipper from the American ports of Savannah and Brunswick, Georgia and Jacksonville, Florida,

under American bills of lading, on the Steamship "Charterhague," and as the shipments were from American ports to a foreign port, deponent verily believes that the Harter Act should be applied.

The bills of lading were American contracts issued at American ports by the Strachan Shipping Company as agents and freight was prepaid at these American ports. [fol. 17] As these bills of lading contained a clause providing for General Average the right of the Charter Shipping Company to collect General Average should be determined, deponent verily believes, under the American Law by the American Admiralty Court.

The General Average act under which the Charter Shipping Company claims its right to a lien against the cargo in General Average was a strand in the American port of Jacksonville at the commencement of the voyage and some of the witnesses in regard to such strand are within American jurisdiction. Libellant's contention regarding the strand is that it was due to the unseaworthy condition of the vessel and the failure of the engines and boilers to function properly.

Deponent also verily believes that the Charter Shipping Company will contend that the vessel was seaworthy before the commencement of the voyage (which libellant denies) in that she had been repaired prior to the voyage in a shipyard in Newport News by American repairmen who presumably would be witnesses, and surveyed at Newport News by a surveyor who would also presumably be a witness, within the American jurisdiction. This testimony would affect the log entries showing the salting of the boilers and leaks in boiler tubes and constant breakdown of engines prior to the voyage and during the voyage.

Deponent also believes that the Charter Shipping Company will contend that the SS. "Charterhague" was properly supplied (which libellant denies) in that the coal sup- [fol. 18] plied as bunkers at American ports just before the commencement of the voyage was of good quality. The witnesses as to this fact are also within American jurisdiction. The importance of this testimony is that the log entries disclose considerable difficulty with firing and maintaining steam.

The Charter Shipping Company will also contend that the said vessel was properly manned before the commencement of the voyage (whereas libellant contends that the chief engineer who sailed with the vessel on said voyage was too ill to attend to any of his duties) and presumably some of the witnesses as to the physical condition of the chief engineer just prior to sailing on the voyage will be residents of American ports.

That on September 25, 1928, respondent filed in this Court Exceptions to the Libel and Exceptive Allegations.

That respondent alleges as grounds for his exception:

(1) That both parties are British corporations.

But the American decisions holding that Admiralty (as distinguished from other Courts) will take jurisdiction as between two foreign corporations or parties are numerous and are cited in part in the memorandum of law herewith submitted.

(2) That a General Average Adjustment has been made up in England.

With this fact neither the libellant nor this Court is at all interested as the only matter in dispute is whether or not [fol. 19] under the American bills of lading constituting the contracts between the parties, the Charter Shipping Company as owner of the vessel, was legally entitled to collect any general average whatever from the libellant or was entitled to any lien upon libellant's cargo in General Average, and this question will be determined by the American Court under the American Harter Act in determining whether or not due diligence was exercised by the vessel owner before the commencement of the voyage to make the vessel seaworthy and properly supplied and manned.

Because of the several reasons hereinbefore stated it is submitted that this Court dismiss the Exceptions and Exceptive Allegations of the respondent and direct respondent to Answer the Libel herein.

Theodore L. Bailey.

Sworn to before me this 3rd day of October, 1928.
Elsa Muller, Notary.

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM DECISION, THACHER, D. J.

(Notation on Motion Papers)

From the authorities it appears that Contribution for General Average is to be determined by the law of the port of discharge. Under all the circumstances the Court should therefore decline jurisdiction, and the Exceptions to the libel will accordingly be sustained.

T. D. Thacher, U. S. D. J.

December 1st, 1928.

[fol. 21] IN UNITED STATES DISTRICT COURT

99-147

BOWRING, JONES & TIDY, LTD., Libellant,
against
CHARTER SHIPPING COMPANY, LTD., Respondent

FINAL DECREE—Dec. 7, 1928

The respondent having filed exceptions to the libel herein, and the same having been moved for argument before this Court by libellant, and the said exceptions having been duly argued by counsel for the respective parties, at a Stated Term for the hearing of Admiralty Motions, held at the Court Rooms in the Woolworth Building, Borough of Manhattan, City of New York, on November 16, 1928;

Now, upon reading and filing the said exceptions and exceptive allegations of the respondent, the notice dated September 26, 1928, moving the same for argument, the affidavit of Theodore L. Bailey, duly sworn to October 3, 1928, [fol. 22] thereto annexed, with proof of service thereof on the proctors for the respondent, said affidavit being submitted in opposition to said exceptions and exceptive allegations, the libel, notice of appearance, monition and the Marshal's return, showing the arrest by him of the S. S. Charterhulme on July 17, 1928, the release by National Surety Company in the sum of $5,750., the affidavit of Cletus Keating, duly sworn to November 15, 1928, submitted in support of said exceptions, and due deliberation having been had thereon, and the Court having endorsed its memorandum in writing, dated December 1, 1928, sus-

taining said exceptions, and the costs of the respondent having been duly taxed at the sum of $98 92/100;

Now, on motion of Kirlin, Woolsey, Campbell, Hickox & Keating, proctors for the respondent, it is

Ordered that the respondent's exceptions to the libel herein be, and they hereby are, sustained; and it is further,

Ordered, adjudged and Decreed that the libel herein be, and it hereby is dismissed with costs; and it is further,

Ordered, adjudged and decreed that the respondent, Charter Shipping Company, recover of and from the libellant, Bowring, Jones & Tidy, Ltd., and its stipulators, the sum of $98 92/100, its costs as taxed, with interest thereon until paid; and that it have judgment and execution therefor; and it is further

[fol. 23] Ordered that unles this decree be satisfied, or an appeal be taken therefrom within ten days after service of a copy thereof on the proctor for the libellant execution may issue against the libellant and its stipulators for costs, their goods, chattels, credits and lands, to enforce satisfaction of this decree.

T. D. Thacher, U. S. D. J.

In United States District Court

[Title omitted]

Notice of Appeal

Sirs: Please take notice that Bowring, Jones & Tidy, Ltd., the libellant in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from the order and decree sustaining the respondent's exceptions to the libel herein, and dis-

[fol. 24] missing the libel with costs, entered herein the 8th day of December, 1928, and from each and every part of said decree.

Dated New York, December 17th, 1928.

Yours, etc., Theodore L. Bailey, Proctor for Libellant, 15 William Street, New York City.

To Alexander Gilchrist, Jr., Clerk; Kirlin, Woolsey, Campbell, Hickox & Keating, Esqrs., Proctors for Respondent, 27 William Street, New York, N. Y.

ALLOWANCE OF APPEAL

The foregoing appeal is hereby allowed.
Dated New York, December 19th, 1928.

F. J. Coleman, U. S. D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

[fol. 25] The Libellant hereby assigns error to the proceedings, rulings, decisions, judgment, decree and order of the District Court in the above-entitled action, as follows:

1. In that the Court declined to retain jurisdiction.

2. In that the Court assigned as a reason for declining jurisdiction that contribution for general average is to be determined by the law of the port of discharge.

3. In that the Court failed to find that the bills of lading issued in America are American contracts and to be construed according to the American law.

4. In that the Court failed to find that the questions as to whether or not there was liability in general average on [fol. 26] the part of the ship to the cargo should be decided under the American contracts and the American Law, especially the Harter Act, as the shipments were from ports in this country to a port in a foreign country.

5. In that the Court dismissed the libel.

Dated New York, December 18, 1928.

Theodore L. Bailey, Proctor for Libellant, 15 William Street, Borough of Manhattan, New York City.

In United States District Court

[Title omitted]

Stipulation re Transcript of Record

[fol. 27] It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated March 15th, 1929.

Theodore L. Bailey, Proctor for Libellant. Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Respondent.

[fol. 28] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 29] In United States Circuit Court of Appeals for the Second Circuit

No. 340. October Term, 1928

Argued May 7, 1929. Decided June 10, 1929

Bowring, Jones & Tidy, Limited, Libel-ant-Appellant,

v.

Chaeter Shipping Company, Limited, Respondent-Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Swan, and Augustus N. Hand, Circuit Judges

Opinion

Appeal from the District Court for the Southern District of New York. Libel filed for the recovery of a deposit made to release a cargo from an alleged lien in general average. Exceptions were filed and the libel dismissed. Libel-ant appeals. Reversed.

Theodore L. Bailey, of New York City, for appellant.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City, for appellee.

MANTON, Circuit Judge:

This libel seeks to recover a deposit made to secure the release of a cargo from an alleged general average lien. The deposit stood in the place of the released cargo, and, if there be no general average liability, the deposit must be released from the lien and delivered to the appellant, as consignee. Exceptions to the libel were filed, based on the claim that the court below had no jurisdiction. A writ of foreign attachment was issued, and the appellee's vessel, the steamship Charterhague, was arrested and subsequently released on filing a bond. Appellee filed a general appearance.

The cargo was shipped under three bills of lading, admittedly containing a general average clause, from ports of Georgia and Florida for British destination. The title passed to the consignee at the shipping port. The General Average Act under which the lien is claimed arose out of a strand in the port of Jacksonville, Fla., at the commencement of the voyage. Some of the witnesses necessary to prove the claim of negligence in the strand and unseaworthiness of the vessel are in the jurisdiction of the United States. Appellant claims the strand was due to the unseaworthy condition of the vessel, and the failure of the engines and boilers to function properly, and lack of due diligence by the appellee. Repairs were made at Newport News, and it is claimed that some repairmen from the plant will be necessary witnesses. Both the appellant and the appellee are British corporations. A general average adjustment has been made up in England.

The appellant argues that, although the bills of lading are not in evidence, they are of United States origin, and by their terms and the provisions of the Harter Act, the appellee was not entitled to general average as against this cargo, or the deposit made to obtain its release, and therefore, the District Court having obtained jurisdiction, and a general appearance having been interposed, the court should retain such jurisdiction. The general average statement made in England is not questioned, but the libel alleges that the vessel was unseaworthy and insufficiently supplied and manned at the commencement of the voyage, and therefore the vessel owner cannot recover from the cargo, relying upon the following authorities: The Jason, 225 U. S. 32,

32 S. Ct. 560, 56 L. Ed. 969; Hurlbut v. Turnure (D. C.) 76 F. 587, affirmed 81 F. 208 (C. C. A. 2); Trinidad Ship-
[fol. 30] ping Co. v. Frame, Alston & Co. (D. C.) 88 F. 528; Schr. Lewis H. Goward (So. D. N. Y. 1924), Ward J., 1924 A. M. C. 1251. In the latter case, the owners of a coal cargo filed a libel for breach of contract to carry the coal to the Azores. The ship put in at Bermuda in a leaky condition, and coal was ordered sold.

The court found that the cargo was accepted at Bermuda and the libel was not dismissed. The shipowners filed a cross-libel for general average, claiming that the exception of leakage qualified the warrant of seaworthiness. Ward, J., said: "Exceptions in a charter party or bill of lading do not apply to it (general average) unless they are expressly stated to do so." It was held that the exception relied on applied only to the contract of carriage and not to general average. To obtain general average contribution, the court said: "the burden lies upon him [the ship owner] to show that she was seaworthy when the voyage began, The Edwin I. Morrison, 153 U. S. 199 [14 S. Ct. 823, 38 L. Ed. 688], or that he was protected by the Harter Act, or by an exception reserving the right to contribution, and that he had exercised due care to make her seaworthy or that her unseaworthiness was not discoverable by due diligence. The Jason, 225 U. S. 32 [32 S. Ct. 560, 56 L. Ed. 969]."

Appellant goes not ask that a general average adjustment be restated, for such an adjustment has been made in England, but merely questions liability on the part of the cargo to the ship because of unseaworthiness. The bill of lading is not in the record, although referred to in the briefs. Where the contract between the parties provides for general average, the provisions of the bill of lading control. In the absence of some provision to the contrary in the bill of lading, the law or custom at the port of destination as to liability for general average prevails. If the bill of lading contains a Jason clause or other clause affecting the rights in general average, such clauses must be enforced. So, also, if it incorporates the provisions of the Harter Act. These questions we do not now determine. The case is here on dismissal, where exceptions to the libel were filed after a general appearance. It was discretionary with the court below to accept jurisdiction, even though the

parties be foreign corporations. The Belgenland, 114 U. S. 355, 5 S. Ct. 860, 29 L. Ed. 152; The Kaiser Wilhelm der Grosse (D. C.) 175 F. 215

The affidavits show that the witnesses as to the seaworthiness of the vessel are American witnesses. If the bill of lading, as is asserted, contained a Jason clause, the question of the exercise of due diligence to make the vessel seaworthy might be a relevant fact to determine the liability of the vessel for a general average contribution. This the trial judge did not refer to. He placed his decision on the ground that general average was to be determined by the law of the port of discharge. This we think an insufficient reason, in view of the proof as to convenience of witnesses for declining jurisdiction. It was expedient, under all the circumstances, to exercise it. The Maggie Hammond, 9 Wall. 435, 19 L. Ed. 772; The Attualita, 238 F. 909 (C. C. A. 4); Fairgrieve v. Marine Ins. Co., 94 F. 686 (C. C. A. 8); Atkieselskabet Korn, etc., v. Rederiaktiebolaget, etc. (D. C.) 232 F. 403.

Decree reversed.

[fol. 31] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

BOWRING, JONES & TIDY, LIMITED, Libelant-Appellant,

v.

CHARTER SHIPPING COMPANY, LIMITED, Respondent-Appellee

DECREE—Filed June 17, 1929

Appeal From the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, reversed, with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 32] File endorsement omitted

[fol. 33] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 34] Supreme Court of the United States

Order Allowing Certiorari—Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,528. U. S. Circuit Court of Appeals, Second Circuit. Term No. 397. Charter Shipping Company, Ltd., petitioner, vs. Bowring, Jones & Tidy, Ltd. Petition for writ of certiorari and exhibit thereto. Filed September 14, 1929. File No. 34,528.